Mohd Abdul Karim bin Abdullah & Ors v Lembaga Kumpulan Wang Simpanan Pekerja

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08(i)-66–03 OF 2024(B)
ABANG ISKANDAR PCA, ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK) AND ZABARIAH YUSOF FCJ
24 JUNE 2025

Statutory Interpretation — Construction of statutes — Section 46 Employees Provident Fund Act 1991 ('the EPF Act') — Whether s 46 EPF Act allowed EPF Board to sue only directors of company for failing to remit EPF contributions without also naming company as co-defendant — Whether principle of joint and several liability in s 46 allowed EPF Board to sue directors independently of company — Whether Court of Appeal's decision to this effect in Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja [2009] 5 MLJ 807 was still good law — Whether issue did not require further clarification from Federal Court — Whether application for leave to appeal had to be dismissed for failing to fulfill threshold requirements under s 96(a) Courts of Judicature Act 1964

The applicants were the directors of a company which had failed to remit to the respondent a total sum of RM3,281,776 in EPF contributions, dividends and late payment charges thereon ('the sum outstanding) between the period September 2021 and July 2022. When demands for payment of the sum outstanding went unheeded, the respondent filed action in the High Court against the applicants alone and proceeded to obtain summary judgment against them for the sum outstanding pursuant to O 14 of the Rules of Court 2012. In their appeal to the Court of Appeal ('COA') against the decision, the applicants contended that under s 46 of the Employees Provident Fund Act 1991 ('the EPF Act'), the respondent should have added the company as a co-defendant along with the directors as the company's liability had to be determined first before the directors were held liable. The applicants contended that the suit against them alone was selective prosecution that could result in the company (which had already been wound up) escaping liability whilst they had to bear the full brunt of its debt. The applicants also argued that the respondent should have sought payment of its debt from the company's liquidator who had taken charge of the its affairs following its winding up. The COA dismissed the appeal and affirmed the High Court's decision. In doing so, the COA followed its previous decision in *Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 5 MLJ 807 ('Ong Kim Chuan') where the court held that s 46 of the EPF Act did not bar the EPF Board from suing only the directors of the company for recovery without naming the company as co-defendant. In its instant application for leave to appeal against

A the COA's decision, the applicants submitted that the COA's interpretation of s 46 of the EPF Act in *Ong Kim Chuan* was wrong.

Held, unanimously dismissing the leave application:

B (1) The leave application failed to fulfill the threshold requirements under s 96(a) of the Courts of Judicature Act 1964. There was no novelty and neither was further ventilation of the issue before the Federal Court of public advantage. The EPF Act, being a piece of social legislation whose paramount objective was to protect the welfare of the employee, ought to be enforced (see para 40).

C (2) There was no conflict, ambiguity or confusion in the meaning and application of s 46 of the EPF Act in respect of the proper party to be sued and the question of joint and several liability of directors with regard to payment of outstanding EPF contributions. The Federal Court's decision D in *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253 showed that even if only one director was sued, the action was still valid and proper in accordance with s 46 where the joint and several liability was given effect to and was enforceable. In that case, the company was not sued and judgment was E entered only against one director and the judgment did not use the phrase 'joint and several liability'. Yet, the bankruptcy notice taken out against the director was held to be enforceable against him on the basis of his joint and several liability under s 46 of the EPF Act. The interpretation of s 46 by the COA in *Ong Kim Chuan* was, in fact, consistent with the view F of this court in *Edwin Cassian* (see paras 33, 37 & 39).

(3) The applicants had not provided any authority to support its proposition as to how and where the COA had gone wrong in *Ong Kim Chuan*. There was also no authority to show that there had been different and conflicting interpretations of s 46 of the EPF Act in respect of the proper G party to be sued and the question of liability (see para 36).

(4) Based on established principles governing leave to appeal, this court had considered: (a) the interlocutory nature of the case, being a summary judgment application; (b) the unlikely prospect of success should leave be H granted; and (c) the low degree of general/public importance/advantage and the necessity of the legal issue being finally clarified or resolved by the Federal Court (see para 38).

[Bahasa Malaysia summary

I Pemohon adalah pengarah di sebuah syarikat yang gagal mendepositkan ke akaun responden untuk jumlah sebanyak RM3,281,776 untuk caruman KWSP, dividen dan bayaran lewat pembayaran ('jumlah tertunggak') antara tempoh September 2021 dan Julai 2022. Apabila tuntutan untuk pembayaran jumlah tertunggak tidak diendahkan, responden memfailkan tindakan di

Mahkamah Tinggi terhadap pemohon dan meneruskan untuk mendapatkan penghakiman ringkas untuk jumlah tertunggak menurut A 14 Kaedah-Kaedah Mahkamah 2012. Dalam rayuan mereka ke Mahkamah Rayuan ('MR') terhadap keputusan itu, pemohon menghujahkan bahawa di bawah s 46 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP'), responden sepatutnya menambah syarikatnya sebagai defendan bersama pengarah kerana liabiliti syarikat perlu ditentukan terlebih dahulu sebelum pengarah dipertanggungjawabkan. Pemohon menghujahkan bahawa tindakan terhadapnya adalah pendakwaan terpilih yang boleh mengakibatkan syarikat (yang telah digulung) melepaskan diri daripada liabiliti sementara mereka pula terpaksa menanggung beban penuh hutangnya. Pemohon juga menghujahkan bahawa responden sepatutnya menuntut pembayaran hutangnya daripada pelikuidasi syarikat yang telah mengambil alih urusannya selepas penggulungannya. MR menolak rayuan itu dan mengesahkan keputusan Mahkamah Tinggi. Dengan berbuat demikian, MR mengikuti keputusannya sebelum ini dalam kes *Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 5 MLJ 807 ('Ong Kim Chuan') di mana mahkamah memutuskan bahawa s 46 Akta KWSP tidak menghalang Lembaga KWSP daripada menyaman hanya pengarah syarikat untuk pembayaran hutangnya tanpa menamakan syarikat itu sebagai defendan bersama. Dalam permohonan kebenaran untuk merayu terhadap keputusan MR, pemohon menghujahkan bahawa tafsiran MR terhadap s 46 Akta KWSP dalam kes *Ong Kim Chuan* adalah salah.

Diputuskan, sebulat suara menolak permohonan kebenaran:

(1) Permohonan kebenaran gagal memenuhi keperluan s 96(a) Akta Mahkamah Kehakiman 1964. Tiada isu yang unik ('novel') yang perlu dijawab di Mahkamah Persekutuan untuk kepentingan awam. Akta KWSP, sebagai undang-undang sosial bertujuan untuk melindungi kebajikan pekerja dan harus dikuatkuasakan (lihat perenggan 40).

(2) Tiada percanggahan, kekaburan atau kekeliruan dalam maksud penggunaan s 46 Akta KWSP berkenaan dengan pihak yang sepatutnya disaman dan persoalan liabiliti bersama pengarah mengenai pembayaran caruman KWSP yang tertunggak. Keputusan Mahkamah Persekutuan dalam kes *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253 menunjukkan bahawa walaupun hanya seorang pengarah yang disaman, tindakan itu masih sah dan wajar menurut s 46 di mana liabiliti secara bersama dan berasingan telah digunapakai dan boleh dikuatkuasakan. Dalam kes itu, syarikat tidak disaman dan penghakiman hanya dimasukkan terhadap seorang pengarah dan penghakiman itu tidak menggunakan frasa 'liabiliti bersama dan berasingan'. Namun, notis kebankrapan yang dikeluarkan terhadap pengarah itu dianggap boleh dikuatkuasakan terhadapnya berdasarkan liabiliti bersama dan berasingan menurut s 46 Akta KWSP.

Tafsiran s 46 oleh MR dalam kes *Ong Kim Chuan* sebenarnya konsisten dengan pandangan Mahkamah ini dalam kes *Edwin Cassian* (lihat perenggan 33, 37 & 39).

(3) Pemohon tidak mengemukakan sebarang otoriti untuk menyokong hujahannya mengenai bagaimana dan di mana MR telah melakukan kesilapan di dalam kes *Ong Kim Chuan*. Juga tiada otoriti dikemukakan untuk menunjukkan bahawa terdapat tafsiran yang berbeza dan bercanggah terhadap s 46 Akta KWSP berkenaan dengan pihak yang sepatutnya disaman dan persoalan liabiliti (lihat perenggan 36).

(4) Berdasarkan prinsip-prinsip yang utuh mengenai kebenaran untuk merayu, mahkamah ini telah mempertimbangkan: (a) sifat interlokutori kes tersebut sebagai permohonan penghakiman ringkas; (b) prospek kejayaan kes yang lemah; dan (c) tahap kepentingan/kelebihan umum/awam yang rendah dan keperluan isu undang-undang untuk dihuraikan atau diselesaikan oleh Mahkamah Persekutuan (lihat perenggan 38).]

Cases referred to

AJS v JMH and another appeal [2022] 1 MLJ 778, FC (refd)

American International Assurance Bhd v Coordinated Services L Design Sdn Bhd [2012] 1 MLJ 369, CA (refd)

Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat [2021] 4 MLJ 1, FC (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of The Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (folld)

Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener) [2015] 4 MLJ 166, FC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie [2021] 5 MLJ 253, FC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v Mohd Abdul Karim bin Abdullah & Ors [2024] 7 MLJ 566, HC (refd)

Marzida bt Mansor v Lembaga Kumpulan Wang Simpanan Pekerja [2023] 4 MLJ 364, CA (refd)

Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja [2009] 5 MLJ 807, CA (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97, FC (refd)

Sivamurthy s/o Muniandy & Ors v Lembaga Kumpulan Wang Simpanan Pekerja [2013] 5 MLJ 533, CA (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (folld)

The Iran Nabuvat [1990] 3 All ER 9, CA (refd)

Legislation referred to

Companies Act 2016 ss 46, 465(1)(e)
Courts of Judicature Act 1964 s 96, 96(a)
Employees Provident Fund Act 1991 ss 46, 64, 65, 65(1)
Rules of Court 2012 O 14

Appeal from: Civil Appeal No B-01(IM)(NCvC)-345–07 of 2023 (Court of Appeal, Putrajaya)

Rajashree Suppiah (with Amira Nur Nadia bt Azhar) (Rajashree) for the applicant.
Afifi bin Ahmad (with Adilah Abdul Wahid and Anis Dayana bt Mat Daud) (Nashili & Co) for the respondent.

Abang Iskandar PCA:

INTRODUCTION

[1] The applicants sought leave to appeal under s 96(a) of the Courts of Judicature Act 1964 ('the CJA') against the decision of the Court of Appeal which ruled, that following *Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 5 MLJ 807 (*Ong Kim Chuan*), 'the directors may be sued independent of the company… and that s 46 of the EPF Act does not bar the EPF to name only director in their claim'.

[2] The Court of Appeal, in so ruling, had thus affirmed the granting of summary judgment by the High Court under O 14 of the Rules of Court 2012 ('the ROC'), upon finding that there are no issues to be tried.

[3] In this application for leave to appeal, the applicants proposed seven questions of law ('QOL') revolving around the meaning and application of s 46 of the Employees Provident Fund Act 1991 ('the EPF Act') relating to:

(a) the naming of a company who is an employer (and/or in the case of a company in liquidation, by involving the company and the liquidator) as a party to the suit together with its registered directors (QOL 1, 2 and 6);

(b) the liability of the directors when the company is not made a party and its liability not being established in the place, and in the case of a company in liquidation, the liability of the directors to pay when the statutory debt becomes a preferential debt claimable against the company and/or its appointed liquidator (QOL 3, 5 and 6);

(c) the question of whether *Ong Kim Chuan* is good law (QOL 4); and

(d) the correct interpretational approach (QOL 7).

[4] Having perused the cause papers in support of and in opposition of the leave application, and having read the judgment of the High Court and the broad grounds of the Court of Appeal, and having heard the submissions by both learned counsel, we are of the considered view that the applicants have failed to fulfil the threshold requirement under s 96(a) of the CJA, for reasons that will be stated below.

BACKGROUND FACTS AND THE ANTECEDENT PROCEEDINGS

[5] The Employees Provident Fund Board ('respondent') filed the writ in December 2022 against the applicants, who were registered directors of Serba Dinamik Group Bhd ('the company') for the failure to pay the outstanding Employees Provident Fund ('EPF') contributions liable to be paid for the period commencing September 2021 until July 2022 ('period of default'), together with dividend and late payment charges. The company was however not named or made a party in this suit.

[6] The total sum claimed was RM2.951m against the first to third applicants; and RM330,776 against the fourth applicant which sum was calculated based on the liability period. In this case, the respondent had filed for a summary judgment under O 14 of the Rules of Court 2012 ('the ROC').

[7] It was brought to our attention, that prior to the filing of the respondent's claim, there was a petition jointly filed earlier, in April 2022, by HSBC Amanah Malaysia Bhd, Ambank Islamic Bhd, Bank Islam Malaysia Bhd, MIDF Amanah Investment Bank Bhd, Standard Chartered Saadiq Bhd, and United Overseas Bank (M) Bhd ('the banks'), for the winding up of the company on the ground of its inability to pay its debt under s 465(1)(e) of the Companies Act 2016 ('the CA 2016'). In the interim, the banks filed a summon-in-chamber for the appointment of an interim liquidator for the purposes of preserving the status quo of the assets of the company pending the disposal of the winding up petition. That application was granted on 23 August 2022 and the High Court appointed Victor Saw Seng Kee, a licensed liquidator of PricewaterhouseCoopers Advisory Services Sdn Bhd as the interim liquidator over the company. On 10 January 2023, the company was finally wound up and the same interim liquidator was appointed as the liquidator.

[8] The above facts are highlighted as it was the applicants' case, inter alia, that the respondent ought to have: (a) claimed the alleged outstanding amount to the appointed liquidator as a statutory debt stood as a preferential debt, and/or it was the interim liquidator who failed to take any action to pay the alleged outstanding amount of contribution; (b) included the company as a party in the writ filed and for that purpose, to apply for leave as the company was in the process of liquidation; and (c) not claimed against the applicants

separately or independently of the company by virtue of s 46 of the Companies Act 2016. Additionally, the applicants, while disputing the total outstanding claimed, had also alleged that the claim was tainted with mala fide, as the respondent had selectively prosecuted its claim against the directors only.

[9] Against those assertions, the respondent maintained that the writ was filed even before the company was wound up, and that, in any event, the outstanding EPF contributions claimed were for the period of default from September 2021 until July 2022, where the applicants were the registered directors. And hence, by virtue of s 46 of the EPF Act, the directors shall, together with the company be jointly and severally liable for the contributions due and payable to the fund.

[10] Further, the respondent contended that the applicants had failed to raise any issues or disputes regarding the outstanding contributions when the demand was made prior to the filing of this suit, at which time the respondent had attached a schedule of arrears of contributions (Form E) and an arrears remittance statement (Form F) as required by law. In this respect, the respondent viewed that by virtue of s 64 of the EPF Act, the certificate in relation to its claims which was duly certified by an authorized officer of the board shall be prima facie evidence of the making of the certificate and of the truth of the contents thereof.

[11] The High Court, having been satisfied that there was no triable issue raised, allowed the summary judgment. Its decision is reported in *Lembaga Kumpulan Wang Simpanan Pekerja v Mohd Abdul Karim bin Abdullah & Ors* [2024] 7 MLJ 566. Dissatisfied, the applicants appealed to the Court of Appeal, and they failed.

[12] Based on the broad grounds of the Court of Appeal, the only issue that was pursued by the applicants was on the point of s 46 of the EPF Act. On this point, the Court of Appeal chose to follow the decision of the Court of Appeal in *Ong Kim Chuan* that the directors may be sued independently of the company. *Ong Kim Chuan* was of the view that s 46 of the EPF Act does not bar the respondent to name only director/s in its claim. Aggrieved, the applicants filed leave to appeal to this court.

TESTING THE PROPOSED QOL AGAINST THE THRESHOLD REQUIREMENT

[13] Section 96 of the CJA has provided for a statutory test against the application for leave to appeal. It states:

> Section 96 Conditions of appeal.

A Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[14] In the oft-cited decision of this court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 (*Terengganu Forest*), which follows the principles laid down by this court in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of The Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 (*Syed Kechik*), the test for leave to appeal has been clarified and summarised, and which shall guide us, in the following manner:

In summary, an intended applicant for leave to appeal to this court should consider the following points before filing his application, namely:

(a) basic prerequisites:

(i) that leave to appeal must be against the decision of the Court of Appeal;

(ii) that the cause or matter must have been decided by the High Court exercising its original jurisdiction;

(iii) that the question must involve a question of law which is of general principle not previously decided by the Federal Court (limb of s 96(a)); and

(iv) that the issue to be appealed against has been decided by the Court of Appeal.

(b) as a rule, leave will normally not be granted in interlocutory appeals;

(c) whether there has been a consistent judicial opinion which may be uniformly wrong eg *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241;

(d) whether there is a dissenting judgment in the Court of Appeal;

(e) leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance;

(f) that leave will not normally be given:

(i) where it merely involves interpretation of an agreement unless this

court is satisfied that it is for the benefit of the trade or industry concerned;

(ii) the answer to the question is not abstract, academic or hypothetical; and

(iii) either or both parties are not interested in the result of the appeal.

(g) *that on impression the appeal may or may not be successful; if it will inevitably failed leave will not be granted* (see Lord Donaldson of Lymington MR in *The Iran Nabuvat* [1990] 3 All ER 9 at para 36.

[15] As we have highlighted earlier, the crux of the applicants' application is on the meaning and application of s 46 of the EPF Act in respect of a claim made against directors independently of the company. Essentially, by their reference to *Terengganu Forest* and *Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1, the applicants argued that leave ought to be granted as defining and clarifying the legal effect of s 46 of the EPF Act is a question of law of general principle and of public importance.

[16] For clarity, we now reproduce the relevant part of s 46 as follows:

Section 46 Joint and several liability of directors, etc.

(1) *Where any contributions remaining unpaid by a company*, a firm or an association of persons, then, *notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid*, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office- bearers of such association during such period in which contributions were liable to be paid, as the case may be, *shall together with the company*, firm or association of persons liable to pay the said contributions, *be jointly and severally liable for the contributions due and payable to the Fund*.

(2) For the purpose of this section —
'contribution' shall be deemed to include any dividend and late payment charges due on any contributions; ...

[17] In this case, the applicants basically questioned, on reading s 46 of the EPF Act, in particular the phrase 'shall together with the company', as to: (a) whether a company or a wound up company (with prior leave) should be named and made a party in a suit, if at all, together with its directors; and (b) whether the claim should be made , against the company who holds the primary obligation as the employer in making EPF contributions, as and when the interim liquidator was appointed on 23 August 2022 and the company was

wound up on 10 January 2023, the directors had lost all rights and control over the company (*American International Assurance Bhd v Coordinated Services L Design Sdn Bhd* [2012] 1 MLJ 369).

[18] The applicants contended that suing the directors alone and without the company constituted a selective prosecution that will result in the company escaping liability (when the outstanding debts stood as a preferential debts), while the directors are put in a completely untenable and unfair position for having to be made independently liable and responsible to pay in full the company's debt, in contravention of s 46.

[19] In this regard, the applicants submitted that the interpretation of *Ong Kim Chuan* is questionable as the Court of Appeal in that case never addressed its mind on the phrase 'shall together with the company' in the said provision.

[20] As such, by relying on the principle of interpretation as espoused by this court in *AJS v JMH and another appeal* [2022] 1 MLJ 778, in respect of applying the plain and ordinary meaning of the words in statute, the applicants argued that *Ong Kim Chuan* cannot be correct, as giving a plaintiff the freedom to file any suit against the directors only is against the clear wordings of 'shall together with the company'. As such, leave to appeal must be granted, according to the applicants, to clarify and to state the correct interpretation of s 46 and to answer the question as to whether *Ong Kim Chuan* is good law. It is for the public importance, as the applicants argued, because the EPF Act is a piece of social legislation.

[21] In response, the respondent submitted that the summary judgment was correctly made because there was firstly, no issue to be tried. Secondly, the applicants never disputed that they were directors during the period of default from September 2021 until July 2022, and that the suit was filed before the appointment of the interim liquidator on 23 August 2022 and the winding up of the company on 10 January 2023. Thirdly, on the proposed QOL, leave ought to be dismissed because both ss 46 and 65(1) of the EPF Act provide a statutory basis of the legality and correctness of the institution of its claim. Section 65 allows recovery of the contributions summarily as a civil debt, while s 46 allows joint and several liability of the directors.

[22] In its submission, the respondent highlighted two points in respect of s 46 of the EPF Act: (a) the joint and several liability; and (b) the non-obstante clause. According to the respondent, the meaning of joint and several liability was decided by this court in *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253 (*Edwin Cassian*) and which was applied recently by the Court of Appeal in *Marzida bt Mansor v Lembaga Kumpulan Wang Simpanan Pekerja* [2023] 4 MLJ 364 (*Marzida*).

[23] Thus, the respondent submitted that *Ong Kim Chuan* is and still remains good law, and that the applicants' contention that the interpretation of the Court of Appeal in *Ong Kim Chuan* was incorrect, was groundless and without merit. The respondent submitted that apart from the applicants' own interpretation of s 46 of the EPF Act, the applicants did not cite any authorities, either via statutory provision or case law, to show how and in what way *Ong Kim Chuan* was wrongly or incorrectly interpreted or decided.

[24] On the non-obstante point, the respondent argued that both ss 46 and 65(1) contain this important clause, which terminology had been defined by this court in *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166 to mean that any such interpretation to be given must be in line with the objective of the enactment of a statute. Hence, in the context of the present case, the respondent said that the purpose of enacting the EPF Act is to cater for a scheme of savings for employees' retirement.

[25] As such, the respondent contended that the purposive approach in interpretation ought to be adopted (*Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97), particularly in tax-related cases (*Sivamurthy s/o Muniandy & Ors v Lembaga Kumpulan Wang Simpanan Pekerja* [2013] 5 MLJ 533).

[26] Hence, the respondent argued that it is not tied or ought to be tied, as suggested by the applicants, to include the company in its recovery claim of the outstanding contributions under s 46 of the EPF Act. The interpretational approach undertaken by the applicants is, according to the respondent, an attempt to limit the application of s 46 of the EPF Act in order for them to escape from the joint and several liability for the contributions due and payable to the fund.

[27] Therefore, the respondent contended that directors cannot evade liability on the grounds that the interim liquidator was appointed and/or the company was finally wound up. Their liability is not subject to the financial status of the company especially when they were the registered directors during the period of default which occurred, on the facts of this case, even before the appointment of the interim liquidator and before the winding up of the company.

OUR VIEW

[28] Having perused the cause papers, and having considered the learned counsel submissions, both written and oral, we appreciate the scarcity of the apex court decision on s 46 of the EPF Act. In fact, of all cases that were cited

A before us, there are only three authorities which are directly on the point of director's joint and several liability under s 46 of the EPF Act. They comprise the decision of this court in *Edwin Cassian*; and two decisions of the Court of Appeal in *Ong Kim Chuan*, and *Marzida*. Interestingly, we noted that these three cases are consistent in their interpretation on director's joint and several B liability in respect of an outstanding EPF contributions during the period of default.

[29] In *Ong Kim Chuan*, the company was initially sued together with the two directors. However, after its winding up, the respondent withdrew its claim C against the company and proceeded only against the two directors on the basis of s 46 of the EPF Act. We noticed, that some of the arguments in *Ong Kim Chuan* are somewhat similar with those raised in this case, particularly on the proposition that the directors cannot be held personally liable to pay the debts of the company which had been wound up as the liquidator or official receiver D has taken over the affairs of the company. The Court of Appeal in this case has held that:

> Under s 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions E were liable to be paid to the EPF) *shall together with the company* be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable 'notwithstanding anything to the contrary in any other written law'.
>
> Being 'jointly and severally liable' the said directors are liable either jointly together F with the company or severally on their own independently of the company. In the present case, the plaintiff may choose to initiate its claim against the company (the defendant) jointly with the two appellants (which was done initially) or to sue the appellants alone without the company (which was done later when the plaintiff withdrew its claim against the defendant after the defendant was wound up). The G liability of the appellants (as directors at the relevant times) is based on the provisions of s 46 of the EPF Act above, not on common law or any other written law, not even the Companies Act 1965. Section 46 stands by itself 'notwithstanding anything to the contrary in the EPF Act or any other written law'.
>
> ...
>
> H The plaintiff had decided not to proceed with its claim against the defendant company. Instead the plaintiff proceeded against the appellants as allowed under s 46 of the EPF Act. *The plaintiff has the right and choice to do so*. There is nothing unlawful about that...

I **[30]** The applicants, in contesting the interpretational approach by *Ong Kim Chuan*, argued that the Court of Appeal in *Ong Kim Chuan* had not addressed its mind on the actual words of s 46 of the EPF Act, in particular the phrase 'shall together with the company'. The applicants, while agreeing that s 46 of the EPF Act creates a statutory liability on directors, however disagree with the

pronouncement by *Ong Kim Chuan* that 'the plaintiff has the right and choice to do so', as that would mean omitting the words that are found in the provision itself, ie, on the applicants' understanding, naming and making the company a party together with the directors by the words 'shall together with the company'.

[31] With due respect, we disagree. Having analysed *Ong Kim Chuan*, we found that the Court of Appeal did state in its judgment the phrase 'shall together with the company', when it said that 'under s 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable…'. Thus, the applicants' submission that the Court of Appeal in that case had not addressed its mind to that phrase was a bare assertion and against the clear wordings of the written judgment.

[32] As we understand it, the Court of Appeal was obviously and fully aware of that phrase, and yet, despite that, it was of the view that the directors can be held jointly and severally liable by virtue of that provision, and that a plaintiff has the right to proceed with its claim against the directors only.

[33] Further, the interpretation of *Ong Kim Chuan* is in fact consistent with the view of this Court in *Edwin Cassian*. Although the facts in *Edwin Cassian* are not on all fours with the facts in the present case, however, *Edwin Cassian* dealt with the sole question of giving effect to the joint and several liability in s 46 of the EPF Act.

[34] In this *Edwin Cassian* case, a bankruptcy notice was filed by the respondent against *Edwin Cassian* alone who was a director of a company for the outstanding unpaid EPF contributions that was recorded in a consent judgment entered into earlier between the respondent and *Edwin Cassian* and the other director. What is important in this case is that, even in the case where the court judgment did not specifically state the word joint and several liability, such judgment was given effect to the liability on a joint and several basis by virtue of s 46 of the EPF Act. This court there stated that:

> [36] The instant appeal concerns a consent judgment entered into between the parties. Of primary importance is s 46 of the EPF Act which imposes joint and several liability on the directors of a company for unpaid contributions. These provisions must be given full effect, as they comprise statutory law. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions, by construing judgments in manner which is not consonant with the EPF Act. In short, the EPF Act prevails over the terms of the judgment.
>
> …

A [39] In our considered opinion, the courts below erred in law in invoking the presumption that joint liability means liability for only half the debt and not the full amount. As mentioned earlier, joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promises. The promisee, ie the board, is therefore entitled to proceed against one promisor, or
B the other, or both, in order to procure full performance as is evident from s 44 of the Act.

[35] Of equal importance was the point on the proper party, where this court in *Edwin Cassian* has held, in a similar vein with *Ong Kim Chuan*, that in the
C case of joint and several liability, the creditor is entitled to proceed against one or the other, or both or any number of debtors, as the case may be. *Marzida* follows *Edwin Cassian*.

[36] Having considered the arguments put forward by the applicants in
D contesting the interpretational approach by *Ong Kim Chuan* in the manner as was suggested by them, we are not convinced that there is any ambiguity in the interpretation of s 46 of the EPF Act which requires further clarification by this court. The applicants have not in fact provided us with any authority to
E support its proposition as to how and where the Court of Appeal had gone wrong in that *Ong Kim Chuan* case. There is also no authority to show that there have been different or conflicting interpretations on s 46 of the EPF Act in respect of the proper party and the question of liability.

F **[37]** Importantly, we are of the view that this court in *Edwin Cassian* had clearly given effect to the provision in s 46 of the EPF Act even in case of where the court judgment did not state such phrase of 'joint and several liability' in a bankruptcy suit filed against a director only. That case indicated that even if a company is not sued or taken action against together with the directors, the
G joint and several liability under s 46 of the EPF Act is effective and capable to be enforced against one director only, in the absence of another director or the company itself.

H **[38]** Having considered all the above, we decided to dismiss this application for leave to appeal. Guided by the established principles governing leave to appeal both in *Syed Kechik* and *Terenganu Forest*, we have considered the following factors:

I (a) the interlocutory nature of the case, being a summary judgment application;

(b) the unlikely prospect of success should leave is granted; and

(c) the low degree of general/public importance/advantage and the necessity of the legal issue being finally clarified or resolved by the Federal Court.

CONCLUSION

[39] Consistency in interpretation by the courts, as was shown by the relevant three authorities cited before us means that there is no conflict, as yet, or ambiguity or confusion on the meaning and application of s 46 of the EPF Act in respect of the proper party and the question of joint and several liability of directors who were/are directors during the period of default to pay the outstanding EPF contributions. *Edwin Cassian* has shown that even if only one director is sued against, that action is valid and proper in accordance with the said provision where the joint and several liability is given effect and enforceable.

[40] In the result we are of the view that this application for leave to appeal does not fulfill the threshold requirement under s 96(a) of the CJA 1964. There is no novelty, neither will further ventilation before us will be of public advantage. The EPF Act assertion, being a piece of social legislation, whose paramount objective is to protect the welfare of the employee, ought to be enforced.

[41] In the upshot, we therefore dismiss this application in encl 1 with cost of RM30,000 to the respondent subject to allocatur.

Application for leave dismissed.

Reported by Ashok Kumar